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Do not present to
the inspector

Tri bunal de l'entreprise francophone de Brussels

Judgement nt

Chamber of Injunctions

Presents the

Do not register

Because of :

1. TUNSTALL GROUP HOLDINGS LIMITED, a company incorporated in another country, having its registered office at Whitley Lodge, Whitley Bridge, Yorkshire DN14 OHR,

2. TUNSTALL GROUP LIMITED, a company incorporated in another country, having its registered office in the United Kingdom at Whitley Lodge, Whitley Bridge, Yorkshire DN14 OHR,

3. TUNSTALL SA, whose registered office is located avenue de Rusatira, 1, 1083 Ganshoren, registered at the ECB under number 0450.915.782,

Applicants

All three lawyers are Carina Gommers (carina.gommers@wiggin.euk), Eva De Pauw (eva.depauw@wiggin.eu), Carl De Meyer and Eleni Foscolos, rue de Namur 72-74, 1000 Brussels,

Counsel: Mr. Carl De Meyer and Ms. Carina Gommers

Against :

1. VICTRIX SOCSAN S.L., a company incorporated under Spanish law, with its registered office in Spain at Calle Ferrocaml 18, 2ª Planta, Oficina 4, 28045 Madrid,

First defendant,

2. TELE-SECOURS vzw, with registered office in 1020 Brussels, 570, avenue de Smet de Naeyer, registered with the ECB under number 0432.708.090,

Second defendant.

Both having for lawyers Maitre Philippe Campolini, Maitre Sophie Van Besien and Maitre Louis Bidaine, rue de Loxum 25, 1000 Brussels (louis.bidaine@avocat.be),

Pleading: Maitre Philippe Campolini, Maitre Louis Bidaine and Maitre Sophie Van Besien

* * *

Having regard to the provisions of the law of 15 June 1935 on the use of languages in judicial matters,

Having regard to the summons of 4 June 2021,

Having regard to the judgement of 15 July 2021 of the Dutch-speaking company court of Brussels, referring the case to our court,

Reviewed our judgment of 27 October 2021,

Having regard to the written observations of the Beige Competition Authority as reviewed at our registry on 2 February 2022,

Having regard to the submissions and documents filed by the parties,

Having heard the parties' counsel in their pleadings at the public hearing of 18 May 2022, at which the case was taken into consideration, only on the alleged violations of competition law and the consequences for the action for an injunction.

1. PURPOSES OF THE APPLICATIONS

1. By the terms of the writ of summons, the plaintiffs, hereinafter TUNSTALL, request the judge of the cessations of:

"Declare that Victrix, by offering (including any communication from Victrix claiming to be authorised to use Tunstall's STMF 'TT92' and/or 'TT92 ST' communication protocol), putting into circulation or using in the territory of Belgium a communication platform supporting Tunstall's STMF 'TT92' and/or 'TT92 ST' communication protocol, infringes claims 1, 6, 7, 8, 9 and 10 of EP'038 within the meaning of Article XI.29 §1 a) and b) CRC;

- *To declare that Tele-Secours, by using in Belgium a communication platform supporting Tunstall's STMF 'TT92' and/or 'TT92 ST' communication protocol, without Tunstall's consent, infringes claims 1, 6, 7, 8, 9 and 10 of EP 038 within the meaning of Article XI29 §1 a) and b) CDE;*

- *Order Victrix to refrain from continuing to offer (including any communication from Victrix purporting to be authorised to use Tunstall's STMF 'TT92' and/or 'T192 ST' communication protocol), to put into circulation or to use in the Belgian territory any communication platform supporting Tunstall's STMF 'TT92' and/or 'TT92 ST' communication protocol, under penalty of a fine of 50,000 euros per day of infringement, starting 48 hours after the service of the cease and desist order;*

- *Order Tele-Secours to refrain from continuing to use on the Belgian territory a communication platform supporting Tunstall's STMF 'TT92' and/or 'TT92 ST' communication protocol, without Tunstall's agreement, under penalty of a fine of 50,000 euros per day of infringement, starting 48 hours after the notification of the cease and desist order;*

- *To grant Tunstall a reservation with respect to any damage caused by Victrix by the aforementioned acts;*

- *Order Victrix and Tele-Secours to pay the costs of the proceedings, including the procedural indemnity.*

2. In its summary submissions, and on the basis of Article 19(3) C.J., TUNSTALL asks the President sitting in cessation of proceedings :

"As a principal:

- *To order Victrix, in accordance with Article 19.3 of the Judicial Code, to refrain provisionally from continuing to offer (including any communication from Victrix claiming to be authorised to use Tunstall's STMF 'TT192' and/or 'TT92 ST' communication protocol), to put into circulation or to use on the Belgian territory a communication platform supporting Tunstall's STMF 'TT92' and/or 'TT92 ST' communication protocol, under penalty of a fine of EUR 50.50,000 for each day of the infringement, starting 48 hours after the notification of the cease and desist order, until a final decision on the merits of the case has been rendered in Tunstall's patent infringement action;*

- *To order Tele-Secours, in accordance with Article 19.3 of the Judicial Code, to refrain provisionally from continuing to use on the Belgian territory a communication platform supporting Tunstall's STMF 'TT92' and/or 'TT92 ST' communication protocol, without Tunstall's consent, under penalty of a fine of 50.50,000 for each day that the infringement occurs, starting 48 hours after the notification of the cease and desist order, until a final decision on the merits of the patent infringement cease and desist action brought by Tunstall;*

- *To reject the claim of Victrix and Tele-Secours on the basis of fair market practice law and, in the alternative, to impose a timetable for the exchange of pleadings and to set a date for oral argument on this point as well as on Tunstall's main claim on patent infringement.*

- *To order Victrix and Tele-Secours to pay the costs of the proceedings, including procedural damages.*

In the alternative :

- *To set the deadline for the parties to agree on the terms of a licence at a minimum of 4 months;*

- *To reject the request of Victrix and Tele-Secours to order Tunstall to provide the defendants with all the information necessary for the use of the Patented Protocols in accordance with the licence to be granted to them by Tunstall, with effect from the 5^{e} day following the notification of the judgment to intervene, under penalty of a fine of 10.00 FUR per day of delay))*

3. The defendants make the following counterclaims:

"As a principal:

- declare that by refusing to grant the Defendants a licence to use its European Patent No EP 2 160 038, Tunstall is committing an abuse of a dominant position within the meaning of Article IV.2 of the ECC;

- The Court found that by refusing to grant the Defendants a licence to use its European Patent No. EP 2 160 038, Tunstall committed an abuse of economic dependence within the meaning of Article IV. 2/1 of the EPC;

*In the **alternative:***

- declare that, by refusing to grant the Defendants a licence to use its European patent No EP 2 160 038, Tunstall is committing an act contrary to honest market practices within the meaning of Articles VI. 104, VI. 104/1, 1°, VI. 105, 7° and VI. 105/1 of the EC Treaty;

In any case:

order Tunstall to grant the Defendants a non-exclusive licence to use its European patent No. EP 2 160 038, allowing them to use, and to allow their customers and subscribers to use, in the French territory, for the entire duration of the protection of the said patent, the "TT92 ST" communication protocols, "STMF TT92", as well as any other communication protocol used by the monitoring units placed on the market by Tunstall and falling within the scope of protection of the said patent, as from the 10th day following the notification of the judgment to intervene, under penalty of a fine of 10.000€ per day of delay;

- to declare that the price of this licence shall be equal to the average price paid by the other Tunstall licensees for the said licence in the Belgian territory and prorated according to the remaining period of validity of the patent at the date of the judgment to be delivered;

- to take note of Victrix's undertaking to place a provision of EUR 10,000 in escrow pending agreement between the parties on the final price to be paid by the Defendants in accordance with the preceding point;

- order Tunstall to provide the Defendants with all the information necessary for the use of the Litigious Protocols in accordance with the licence to be granted to them by Tunstall, as from the 5th day following the notification of the judgment to be delivered, under penalty of a fine of €10,000 per day of delay;

- declare Tunstall's claims unfounded, and dismiss Ten;

- order Tunstall to pay costs, including procedural damages of €13,000.

3. CONTEXT OF THE DISPUTE

4. The cessation judge refers to the statement of facts in the judgment of 27 October 2021, which should be considered as reproduced here.

5. It should also be remembered that TUNSTALL has a patent - the European patent EP 2 160 038 B2, valid in particular in Belgium - protecting the protocols used in the televigilance sector that it has developed.

The patent relates to a method of encoding *dual-tone* multi-frequency (DTMF) digital elements into sequential tone *multi-frequency* (STMF) signals and to a system for generating, sending, receiving and decoding STMF signals.

This patented technology provides sequential tone multi-frequency coding (STMF) on the analogue network using two frequencies occupying a DTMF digital element time slot and a digital element interval time slot (p. 10 of TUNSTALL's summary findings). In particular, this STMF technology supports two communication processes, developed by TUNSTALL, namely the TT21 STMF and TT92 STMF protocols.

The parties agree that the reason for the development of this technology is the lack of reliability, as telephone networks have evolved, of DTMF technology, the purpose of which is to encode audio frequency tones in the form of a simultaneous pair and then transmit them (pp. 10 and 18 of TUNSTALL's summary and p. 7 of TELE-SECOURS' and VICTRIX SOCSAN's summaries).

The patented technology thus offers greater reliability in the transmission of information between end-subscriber reception units and the software that processes the signal.

4. DISCUSSION

As for the counterclaim

4.1. First plea : Abuse of a dominant position

6. TELE-SECOURS and VICTRIX SOCSAN argue that TUNSTALL is abusing its dominant position within the meaning of Article IV.2 CDE.

Elies allege, in substance, that this conduct is the result of TUNSTALL's refusal to grant them a licence to use the technology protected by European patent EP 2 160 038 B2 and the protocols derived from it, which TUNSTALL disputes.

7. Article IV.2, paragraph 1er CDE provides that "it *shall be prohibited, without a prior decision to that effect, for one or more undertakings to abuse a dominant position in the relevant market or in a substantial part thereof".*

Article 1.6, 12° of the same Code defines a dominant position as "*the position which enables an undertaking to prevent effective competition being maintained by affording it the possibility of behaving to an appreciable extent independently of its competitors, customers or suppliers".*

The application of Article IV.2 CDE requires the following conditions to be met:

1. The parties to the case are undertakings within the meaning of competition law;
2. The relevant markets (material and geographical) are determined;
3. An undertaking has a dominant position in the relevant market(s);
4. A company abuses this dominant position.

The first condition does not pose any difficulty, since TUNSTALL, VICTRIX SOCSAN and TELE-SECOURS are undertakings within the meaning of competition law, as the CBA notes (observations, p. 9).

The examination of other conditions deserves further elaboration.

8. Furthermore, if trade between Member States is likely to be affected by the position of an undertaking, European competition law must be applied, in accordance with Article 102 TFEU.

This is the case in Pespece. The conduct of which TUNSTALL is accused is capable of affecting trade between Member States, as pointed out by PABC (comments, pp. 10-11), VICTRIX SOSCAN and TELE-SECOURS (in their summary conclusions, p. 24), and this without being contradicted by TUNSTALL.

The injunction judge will thus apply both the European and national competition rules in examining the conditions of the abuse of dominant position alleged against TUNSTALL (N. Neyrinck, *Manuel de droit beige de la concurrence*, l[ere] ed., Brussels, Bruylant, 2021, p. 10).

A. Relevant markets

9. The relevant market is characterised by the homogeneity of the products - material relevant market - that make it up in a given territory - geographical relevant market (L. Desaunettes-Barbero and E. Thomas, *Droit materiel europeen des abus de position dominante. Textes et commentaires,* Competition Law-Droit de la concurrence, 2019, Bruylant, Brussels, p. 199-200).

Ad. ***Walk material***

10. Based on the distinctions made by PABC, the parties agree on the definition of the relevant material markets (also called "product and service markets") in Pespece.

These are (in the direction from Paval to Pamont):

1. Market for telecare services for the elderly and vulnerable ;
2. Sales market for telecare devices (these devices are called "reception units");

3. The operation of televigilance platforms (software) ;
4. Running protocols (ensuring communication between the reception units and the telecare software).

The protocols market (4eme market) crystallises the difficulties between the parties. VICTRIX SOCSAN and TELE-SECOURS criticise the behaviour of TUNSTALL which, abusing its dominant position on this market, would exclude VICTRIX SOCSAN from the downstream market of televigilance platforms (software) (3eme market).

The conclusions of TELE-SECOURS and VICTRIX SOCSAN show that the latter was technically unable to implement the software ordered by TELE-SECOURS because TUNSTALL required it to stop using the TT92 STMF protocol.

11. While the parties confirm the existence of a protocol market, they disagree on the contours of this market, and more particularly on the possible inclusion of TUNSTALL's patented technology in this market.

VICTRIX SOCSAN and TELE-SECOURS claim that TUNSTALL's patented protocols constitute a market in themselves, as it would be impossible to replace these patented protocols with other royalty-free protocols (DTMF, SCAIP, etc.).

TUNSTALL disputes the existence of a separate market for its patented protocols and argues that such a market exists only if there are no alternative protocols (as an alternative technology for connecting reception units and care platforms).

12. A market for the manufacture of a final technological product, protected by a patent, may in itself constitute a separate market if there are no other appropriate, i.e. substitutable, technologies (CBA submission, pp. 16-17).

The methodology for defining technology markets is based on the same principles as those applied for the definition of product markets (CBA Comments, p. 16). The relevant product market comprises "*all those products and/or services which the consumer regards as interchangeable or substitutable by reason of their characteristics, price and intended use*" (European Commission Notice on the definition of the relevant market for the purposes of Community competition law, No. 97/C - 372/03, point 7).

One of the methods used to define the market is to assess the substitutability of demand. Indeed, "*assessing the substitutability of demand entails a determination of the range of products perceived as substitutable by the consumer. One way of making this determination may be seen as a mental exercise presupposing a small, but lasting, change in relative prices and assessing the likely reactions of customers. The market definition exercise focuses on prices for operational and practical reasons and, more specifically, on the demand-side substitution that could result from*

small but permanent changes

in relative prices. This test can provide clear guidance on the elements relevant for market definition" (ibid., p. 15).

Of two things Pune (L. Desaunettes-Barbero and E. Thomas, *Droit materiel europeen des abus de position dominante. Textes et commentaires,* Competition Law-Droit de la concurrence, 2019, Bruylant, Brussels, p. 50):

- If it turns out that the price increase is exclusively beneficial to the owner of the technology, this means that a significant number of consumers are captive to the product;

- Conversely, if a sufficient number of consumers relate to a substitute product and the increase in the product does not benefit the technologist, the two products must be considered as substitutable and belong to the same competitive market.

13. The question is thus whether customers of a patented technology product - in this case TELE-SECOURS and VICTRIX SOCSAN - could switch to readily available substitutes or to suppliers located elsewhere, in the event of a small but permanent increase in the relative prices of the technology supplied.

TELE-SECOURS and VICTRIX SOCSAN consider that, insofar as TUNSTALL's patented protocols are "indispensable" to enter the protocol market (to create an alternative technology), this market for patented protocols would necessarily constitute a separate market from the other existing protocols.

TUNSTALL points out that the indispensability criterion is applied exclusively in the context of assessing abuse of a dominant position.

14. At the market definition stage, it is up to the judge to determine whether there are alternative protocols to the protected TUNSTALL protocols.

The Court of First Instance observes that the substitutability of a product or service, which makes it possible to define a product or service market, cannot be confused with the criterion of "indispensability", which is used exclusively to assess the abusive nature of the critical conduct. These two concepts, which partly overlap, are not identical and, above all, pursue different objectives (i.e. defining the relevant market vs. verifying that the patented service is "indispensable" for the creation of a new product).

15. TELE-SECOURS and VICTRIX SOSCAN do not demonstrate that the disputed TUNSTALL protocols constitute a separate market in themselves.

Without being contradicted, TUNSTALL states that there are about a hundred protocols for communication between the reception units and the help desk software, including the patented protocols (Exhibit 41 in the plaintiffs' file).

It also appears from this piece that, among all the protocols available on the nrarch, 70 protocols would be compatible with the televigilance platform developed by TUNSTALL.

Furthermore, in addition to the list of alternative products filed by TUNSTALL, it is established that the VICTRIX UNDER AN platform is "open", which means that it is compatible with "*most protocols used on the market, including digital protocols*" (p. 34 of the defendants' summary conclusions). Elie is therefore compatible not only with TUNSTALL's patented protocols, but also with other protocols used on the market.

The BERG INSIGHT study filed as part of the defendants' exhibits supports this by stating that "*The Victrix Care Platform is cloud-based and it can be deployed using the service providers' existing technology infrastructure*" (defendants' exhibit E.7, p. 95). This statement tends to demonstrate that the VICTRIX SOCSAN platform is specifically designed to be interoperable with existing infrastructure, including existing TUNSTALL protocols and open source protocols.

In addition, VICTRIX SOCSAN's offer to TELE-SECOURS of 17 July 2018 states that the platform to be implemented uses the protocols "TT92", "TT92ST" and "SCAIP" (Exhibit C.5, of the defendants). There are therefore royalty-free protocols - namely "SCAIP" - on the market, which are compatible with the VICTRIX SOCSAN platform.

The fact that a platform can be indiscriminately compatible with different analogue (and/or digital) protocols shows *a fortiori* that there is a multitude of substitutable (or, at least, cumulative) protocols.

16. As a result, operators active in telecare have a range of protocols at their disposal, which can be substituted for each other. The services offered by TUNSTALL on the protocol market are therefore one technology among others and therefore do not constitute a market in itself.

A. ii. Geographic market

17. The parties also disagree on the geographical scope of the protocol market (the only relevant market in this case).

TELE-SECOURS and VICTRIX SOCSAN argue that the protocol market is national in scope, while TUNSTALL argues that the market is community-based.

18. The geographic market in this case "*comprises the territory in which the undertakings concerned are engaged in offering the goods and services in question, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition there differ appreciably*" (CBA submission, pp. 18-19).

In order to belong to the same geographic market, the two competing products must be able to compete in a homogeneous manner from the consumer's point of view. This homogeneity depends on various factors, such as transport costs, the nature of the product or the existence of specific legal constraints (L. Desaunettes-Barbero and E. Thomas, *op. cit.,* p. 62).

The Brussels Court of Appeal ruled that :

Geographic market" means the market which covers the territory in which the undertakings concerned are engaged in the supply of the goods and services in question, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition there differ appreciably. In order to assess the scope of the geographic market, it is necessary to examine whether companies established in other areas are a genuine alternative source of supply for consumers and whether the parties' customers would transfer orders to companies established elsewhere in the event of a price change" (Brussels, 18 June 2004, p. 357).

It is in the light of these principles that the relevant geographic market must be determined.

19. Relying on a decision of the European Commission (case M8244, *Coca-Cola),* TELE-SECOURS and VICTRIX SOCSAN point out that a national geographic market can exist despite the fact that the wholesalers operate in all the Member States of the European Union.

The Court of First Instance and the Court of First Instance of the European Communities note that the protocols at issue are protected by patents valid only in eight European States (Belgium, Germany, Denmark, Spain, Finland, France, the Netherlands and Sweden), which would indicate that the market is national in scope. They therefore note that the suppliers active on the market for protocols and hosting units are generally active in certain European countries (excluding the entire European market).

20. TUNSTALL insists that the nationalities of the parties demonstrate the Community dimension of the relevant market (VICTRIX SOCSAN being Spanish, TUNSTALL English) and that only singularities of the beige market could give rise to the existence of a national geographic market. However, such peculiarities do not exist insofar as the platforms and protocols used in the European Union are harmonised and must conform to European rules.

TUNSTALL also points out that there is no justification for having a patent valid for the whole of Europe insofar as telesurveillance is implemented differently in different States. Similarly, it maintains that the fact that a company is not active in all European countries does not prevent it from concluding that it is operating in a European or

even world market.

Elie also points out that there are no linguistic constraints in the protocol market as long as it concerns exclusively the transmission of a code signal.

21. The cessation judge shall observe the following:

1. From the supply side, there is no evidence that the market for protocols would be restricted to the national level.

a. No restrictions

As the CBA points out, there are no import restrictions, transport costs or national technical requirements (notwithstanding the existence of different technical constraints in different Member States, *see* below) for the supply of the protocols, as these are intangible goods (CBA comment, p. 20).

b. Scope of action of companies active in the market

The companies active in the protocol market are also European in scope.

The BERG INSIGHT study states that "*the European market for telecare equipment is* highly consolidated" (defendants' Exhibit E.7, p. 33).

The study also shows that major European players provide integrated packages to their customers throughout Europe ("*end-to-end telecare solutions*", with the corollary of offering communication protocols between their platforms and their reception units). This is particularly true of TUNSTALL, LEGRAND, TELEALARM and DORO. A comparative reading of figures 2.4, 2.5 and 2.7 of the study (defendants' Exhibit E/7, pp. 30-33) leads to the conclusion that LEGRAND offers integrated solutions to customers in England (through its subsidiary TYNETEC), Spain, Germany, Sweden, Norway, Austria, Switzerland (through its subsidiary NEAT) and France (through its subsidiary INTERVOX).

The range of companies active on this market explains why, on the occasion of the public tender launched by CSD LIEGE, companies based in different Member States - namely ESI FRANCE, TUNSTALL and VICTRIX SOCSAN (none of these companies is a beige company) - submitted bids.

In particular, TUNSTALL - which is only one of several players _____is active in the European countries - United Kingdom, Spain, Germany, France, the Netherlands, Belgium, Denmark, Finland and Sweden - which represent 92% of the televigilance sector in Europe in terms of connections (p. 31, of the TELE-SECOURS and VICTRIX SOCSAN summary conclusions; p. 47 of the TUNSTALL conclusions)

The fact that TUNSTALL or other companies (such as DORO) are active exclusively in certain countries does not contradict the fact that the market in which they operate is European in scope.

As TUNSTALL points out, the limited presence of a company in certain territories does not *ipso facto make it* possible to consider that the geographical scope of the market is itself limited.

It is in this sense that the Court of Appeal of Brussels has ruled that :

The geographic scope of a market does not depend on the geographic area in which the undertakings offering a type of product or service are established or on the geographic scope of a business transfer agreement. It corresponds to the area within which the conditions of competition are sufficiently homogeneous" (Brussels, 29 September 2006, *Ann. prat.*, 2006, p. 898).

In other words, the fact that an operator has a lower penetration rate in some European countries (or is simply not present) cannot, in itself, lead to the conclusion that the market in which it operates is not European in scope.

This shows that service providers are able to offer protocols for the entire European market. There is a *fortiori* a homogeneity on a European scale in terms of protocol offers.

2. Under the demand angle, if it is true that the conditions of competition

In the case of a market in which the players are active on a European or global scale, it is necessary to establish the existence of specific characteristics (language, consumer preferences, etc.) linked to that State.

This is the case for the soft drinks market, which the European Commission considers to be national in scope due to differences in consumption patterns, logistics and distribution networks, marketing strategies, *etc. ("due to differences in consumption patterns, logistics and distribution networks, marketing strategies, etc.",* Commission Decision of 21 December 2016 declaring a concentration compatible with the common market, Case M.8244, *Coca-Cola Company).*

In Greece, it cannot be considered that specific constraints at the beige level tend to restrict the geographical scope of the protocol market at the national level.

a. Language

As these are code messages sending signals between host units and platforms, the language between the Helpdesk operator and the protocol provider is of little relevance.

The judge also noted that, in the relations between TELE-SECOURS and TUNSTALL, the use of English was commonly accepted, both for commercial communications (e.g., defendants' Exhibit C.3, expressing the difficulties of implementing the PCN 7 platform) and for technical communications (defendants' Exhibit D.17, constituting the user's brochure '*STMFprotocol, GSM/Next Generation Network and telecare home units')*.

Language is therefore not a national specificity as far as the protocol market is concerned.

b. Technical considerations

According to TELE-SECOURS and VICTRIX SOCSAN, an indication of the national nature of the protocol market would be the technical conditions of use of the network for telecare services. The networks used for the passage of codec information would vary according to the country (France, for example, is not very dependent on patented protocols insofar as communication is essentially carried out by GSM networks, unlike Belgium). Similarly, the digitisation of information in a number of countries would accentuate the national character of the market.

TUNSTALL replies that, although the conditions of access to the network vary, the platforms and docking units are interoperable with different networks and protocols (in France, where communication is via the GSM network, TUNSTALL sells the same platforms and docking units as in Belgium).

First of all, it should be noted that, faced with TUNSTALL's inability to implement the PNC7 platform at TELE-SECOURS between 2014 and 2018, the latter resorted to the services of VICTRIX SOCSAN (of Spanish nationality). The same applies to the public contract launched by CSD, which consulted companies established in Belgium and abroad (in France and in Spain; defendants' exhibit D.3).

This approach shows that, notwithstanding the differences at European level in the use of the network of telecare services, any operator can turn to a European player for supplies.

The fact that in some countries STMF technology is more necessary than DTMF technology, or that network digitisation is increased, does not in itself change the essence of the demand of the providers of a telecare service for the use of protocols at European level. Operators need a connection between their platform and the helplines.

Furthermore, the BERG INSIGHT study indicates that all European countries - the former 28 EU Member States, plus Switzerland and Norway - have a presence of telecare services (albeit with a different penetration rate), with a total of 5,220,000 end consumers (defendants' exhibit E.7, p. 28).

While the study notes that there are still national differences in the adoption of telecare solutions (p. 27), as noted above, the European market for telecare equipment is highly consolidated ("*the European market for telecare equipment is highly consolidated*", p. 33).

There is *a fortiori no* national preference or particular habit on the part of beige consumers which would allow the existence of a national market to be detected.

It follows from the above that the conditions of competition for the marketing of protocols are sufficiently homogenous in the European Union.

The relevant geographic market is, therefore, European.

B. TUNSTALL's position in the protocol market

22.11 It is now necessary to determine whether TUNSTALL has a dominant position on the protocol market.

The burden of proof of TUNSTALL's possible dominance on this market lies with TELE- SECOURS and VICTRIX SOCSAN.

In the context of this analysis of TUNSTALL's market power, the termination judge noted that the risk of producing anticompetitive foreclosure makes it possible to assess Texistence of a dominant position.

Methodologically, it is necessary to identify a scenario of harm to competition, which translates into a comparison of the current situation (or the situation likely to prevail in the future on the relevant market as a result of the dominant undertaking's conduct) with an appropriate counterfactual scenario (i.e. a scenario without the conduct complained of, or with another realistic scenario in view of the established commercial practices) (N. Neyrinck, *op. cit.*, pp. 330-331)

This is how :

"As a standard of proof, the "risk" of foreclosure implies that the dominant undertaking can be sanctioned even though there is some ambiguity as to the consequences of its behaviour. It is often the case that the data presented by the parties do not allow the impact of a practice on the market to be assessed with certainty. Faced with this reality, courts will try to use common sense and exercise their discretion in a world where the exact contours are uncertain and where prospective assessment is even more uncertain" (ibid., p. 331).

It is in the light of these evidentiary principles that TUNSTALL's conduct must be analysed.

B.i. Lack of a separate market for TUNSTALL's patented protocols

23. Based on the assumption that the proof of an abuse of a dominant position is difficult to provide, TELE- SECOURS and VICTRIX SOCSAN recall that the degree of proof must be provided with a reasonable degree of certainty (article 8.5 of the Civil Code) and, furthermore, that proof by probability is admitted for positive facts for which, due to the nature of the fact to be proven, it is not possible or not reasonable to require certain proof.

On the merits, TELE-SECOURS and VICTRIX SOCSAN argue that, since the market for TUNSTALL's patented protocols is in itself a separate market from that for other existing protocols, TUNSTALL is in a monopoly position. This monopoly has the effect of restricting downstream competition in the market for hosting units and platforms.

24. TUNSTALL disputes that it is dominant in the relevant market (and, if found to be dominant, it disputes that it is abusing that position).

In its view, in addition to the fact that no concrete evidence has been put forward by TELE-SECOURS and VICTRIX SOCSAN, it points out that alternative technologies perform the same functions as TUNSTALL's patented technology.

25. TELE-SECOURS and VICTRIX SOCSAN wrongly assume that the patented TUNSTALL protocols constitute a separate market.

Indeed, it has been noted above that :

- About a hundred protocols ensure the communication between the reception units and the telecare software, among which are the patented protocols (plaintiffs' exhibit 41);
- 70 protocols from different suppliers are compatible with the TUNSTALL monitoring platform (plaintiffs' exhibit 41);
- The VICTRIX SOCSAN platform is "open", which means that it is compatible with *"most protocols used in the market, including digital protocols*", including patented protocols (p. 34 of the TELE-SECOURS and VICTRIX SOCSAN conclusions);
- A legal fibre protocol ("SCAIP") is compatible with the VICTRIX SOCSAN platform.

These findings lead to the conclusion that TUNSTALL's patented protocols are one of several technologies available on the protocol market.

26. However, this conclusion does not preclude an analysis of TUNSTALL's position on the European protocol market.

B.ii. Analysis of TUNSTALL's position in the protocol market

27. As the CBA points out, in accordance with the European Commission's Guidelines on Horizontal Cooperation Agreements (CBA Comments, p. 22), to the extent that an undertaking active in the technology sector with an exclusive right to a technology may restrict the ability of competitors to improve their technology, the effect of the sale of the products and services converted by the patented technology on downstream markets for products and services must be taken into account.

By way of example, a starter is considered to be an essential component for the operation of an aircraft engine. The engine manufacturer (being the end product), active in the downstream market, is dependent on the technology of the starter manufacturers. The behaviour of the upstream undertaking - the one manufacturing the starters - may be such as to limit or disrupt the supply of starters for large commercial aircraft engines (see Case T-210/01, *General Electric Company v. European Commission,* judgment of 14 December 2005, paragraphs 298 to 300; case referred to in the context of mergers, but valid *mutatis mutandis* in the assessment of abuse of a dominant position). Therefore, foreclosure preventing the input from entering a (downstream) market for the production of a (semi-)finished product due to the technology used upstream is a source of competition concern.

28. Therefore, in this case, TUNSTALL's market share in the protocol market should be analysed on the basis of the proportion of downstream products (i.e. platforms and docking units) that are configured to operate primarily with TUNSTALL's patented technology versus downstream products that operate with alternative technologies.

TUNSTALL's possible dominance in the protocol market must therefore be analysed in the light of the market shares of the host units *(a.)* and platforms *(Ji.)* compatible with TUNSTALL's patented technology in these respective markets.

a. Effects of TUNSTALL on the host unit market

29. TELE-SECOURS and VICTRIX SOCSAN point out that, on the beige market for telecare reception units, TUNSTALL has at least 50% of the market share (based on its three main customers - TELE-SECOURS, CSD LIEGE and Z-PLUS, which would account for 40% of demand on the beige market and would constitute a representative sample).

On the European market, according to the BERG INSIGHT study, TUNSTALL has a consolidated market share of 38% at the European level which, combined with the other analysis criteria, would lead to the finding of a dominant position.

Finally, they add that TUNSTALL agrees with the figures put forward, which are certainly based on assumptions, since the latter does not provide any precise data on its market power.

30. TUNSTALL contests the figures provided by TELE-SECOURS and VICTRIX SOCSAN and considers that, since the latter have not provided any tangible figures, their allegations are purely speculative.

As far as the European market is concerned, TUNSTALL recalls that it has a market share of 38% and faces other operators with strong positions such as LEGRAND (30%), DORO or TELE ALARM (10%, respectively).

31. The starting point for the analysis of market power is the market shares attributed to the companies in the relevant market (L. Desaunettes-Barbero and E. Thomas, *op. cit.*, p. 92).

Thus, large market shares are, save in exceptional circumstances, proof of the existence of a dominant position (in the case of a regulated company, 50% is sufficient to confirm this, *cf.* CJEU, 3 July 1992, C-62-86, *AkzoChemie/Commissioii).* Similarly, the existence of a significant gap between the market share of the undertaking in question and that of its competitors supports the existence of a dominant position. The maintenance of a high market share over time is also an indication of market dominance.

Conversely, modest market shares are generally a good indicator of the absence of strong market power. It is thus unlikely that an undertaking is in a dominant position if it represents less than 40% of the relevant market (L. Desaunettes-Barbero and E. Thomas, *op. cit.*, p. 93).

However, even below this threshold, an undertaking may be considered dominant *(ibid.).* As the CBA points out, a market share of between 25% and 50% may be indicative of dominance if other elements contribute to the demonstration (CBA Comments, p. 23).

32. As explained above, the relevant geographic market for the protocols is European in scope.

For the same reasons, such a scope should also be retained for the market for reception units. There is nothing to contradict this finding (the language criteria relied on by TELE-SECOURS and VICTRIX SOCSAN are irrelevant insofar as the reception units can be designed to be adapted to a specific linguistic public, since TUNSTALL equips both French-speaking and Dutch-speaking customers, pp. 48-49 of the plaintiffs' summary conclusions).

33. On the one hand, with regard to market shares in the care unit sector, it is not disputed that TUNSTALL occupies 38 % of the European market (p. 29 of the defendants' summary conclusions). This figure is taken from the BERG INSIGHT study, which states that TUNSTALL sold 230,000 telecare equipment units out of 602,000 in 2018.

TUNSTALL has therefore a strong market power, being the leader in this segment. Elie is also well established in all the main European countries which use remote assistance (United Kingdom, Spain, Germany, France, the Netherlands, Sweden, Ireland, Belgium, Norway, Denmark, Italy, Finland, Austria and Switzerland; study by BERG INSIGHT, defendants' exhibit E.7, p. 32), which gives it significant potential for economies of scale and network strength

However, LEGRAND, described by the BERG INSIGHT study as a "*strong player*" (thanks to acquisitions in previous years; defendants' Exhibit E.7, p. 31), has sold 178,000 units and thus has a 30% market share. None of the parties argue that LEGRAND's reception units would operate on the basis of STMF technology.

In view of the small gap between the two European leaders in the market for the supply of telecare units, it does not appear *prima facie* that TUNSTALL would have greater market power than its competitors (even if it is the leader).

34. On the other hand, with regard to the compatibility of the care units with the patented protocols, it appears from TUNSTALL's diagram 1 (its summary conclusions, p. 51), entitled *"Care unit suppliers in the EU and protocols*", that TUNSTALL and NEAT - which has been licensed by TUNSTALL (defendants' exhibit D.l) - use STMF technology.

This STMF technology is therefore an important part of the market. It has been implemented in many areas of the European market (United Kingdom, Ireland, Spain, France, Germany, Belgium, Netherlands, Denmark, Norway, Finland, Sweden and Switzerland).

This shows that a significant number of telecare units, delivered on the European market, are compatible and make use of the patented protocols.

However, the judge found that the parties had not provided any evidence enabling him to determine (or even to deduce) the exact market share of the remote assistance units provided by TUNSTALL or its licensees that are compatible with the patented protocols.

In particular, it is worth noting that there is a lack of knowledge of the following

- the proportion of TUNSTALL's helpdesk units that operate mainly with the patented technology (the plaintiffs' diagram No. 1 - p. 51 of their summary conclusions - shows that TUNSTALL sells digital network-compatible docking units, which has the corollary of reducing the proportion of TUNSTALL's docking units compatible with the patented technology);
- the penetration rate of NEAT - a TUNSTALL licensee - on the host unit market;
- the proportion of NEAT's telecare units that operate mainly with STMF technology (for the same reason as for TUNSTALL, NEAT being also active on the digital network).

Due to this lack of information, it is not possible to analyse TUNSTALL's dominance of the protocol market in the light of the market shares of docking units compatible with TUNSTALL's patented technology.

35. However, market shares are not the only relevant element for assessing possible dominance in a given market.

Technological and technical barriers to market entry may create market power for one player (C. Prieto and D. Bosco, European Competition Law. Bosco, *Droit europeen de la concurrence. Ententes et abus deposition dominante*, coll. Droit de 1'Union europeenne, Brussels, Bruylant, 2013, p. 844).

This is the case for :
- technological advances. Such advances can be indicative of a company's dominance in a market;
- network effects. The value of a product increases as more and more users use it, and incidentally decreases the attractiveness of other technologies.

36. TELE-SECOURS and VICTRIX SOCSAN plead in this sense. They believe that technological advantages strengthen TUNSTALL's position on the market and that it creates a network effect by making its equipment irreplaceable.

The following elements are used by the Elies:

- The patent held by TUNSTALL strengthens its dominant position, in particular because it obliges its customers to block units in a mode that makes exclusive use of the patented STMF protocols;
- exclusivity clauses are attached to the contracts offered by TUNSTALL to TELE-SECOURS;
- TUNSTALL is indifferent to the behaviour of its competitors since there are barriers to entry to the market as a result of the impossibility for its customers - described as captive - to change platforms in complete safety, given the obligation to use STMF protocols, the only reliable protocol in an analogue network.

37. TUNSTALL disputes this position and explains that STMF protocols are not *ipso facto* used by its customers.

Elie also claims that its units are programmed in DTMF by default. STMF would only be used when switching from one mode to another, when network conditions require a switch to STMF to avoid any difficulties in passing the signal.

38. It is undisputed that STMF technology offers guarantees to the telecare services and their end users. In the event of a DTMF network failure, the patented technology is able to ensure the transmission of the signal between the platform and the reception unit. This is the raison d'être of the technology.

If it is not possible to switch to the patented technology, there is a real and vital risk to end-users whose signal would simply not be received by the platform.

The patented technology has unparalleled advantages in an analogue network (which still dominates the European market).

Telecare operators, who are required to provide a high quality of service to their end customers and to deliver highly reliable technology, therefore have a strong need to use the patented STMF technology in the presence of an analogue network.

This is all the more true since, on the instructions of TUNSTALL itself, its units must be set up with the programming code to communicate in STMF, as the operating standard (defendants' exhibit D.9). TUNSTALL considers this instruction to be exceptional and based exclusively on an isolated technical event, but does not provide any evidence to refute the fact that certain units must necessarily operate in a default STMF setting.

These secondary analytical criteria in assessing market power tend to show that, potentially, TUNSTALL could be dominant in the market for reception units.

The technological advances enjoyed by this half century could indeed create a barrier to entry into the market for telecare units if the STMF technology were to be required for the operation of such units.

39. However, the cessation judge notes that the patented protocols, although a very reliable technology, are not the only ones to ensure the link between host units and platforms.

From TUNSTALL's diagram 1 (its summary conclusions, p. 51), entitled "*Suppliers of telecare units in the EU and protocols*", it appears that the European market is indeed home to suppliers willing to supply units that are not based on the STMF communication mode.

These players, although smaller than TUNSTALL (DORO, TELEALARM, CHUBB and ASCOM, the latter two being active in the beige market), use DTMF technology. These players are mentioned in the BERG INSIGHT study and are the suppliers of 144,000 telecare devices (respectively: DORO with 59,000 supplies; TELEALARM, with 55,000 and CHUBB, with 30,000; BERG INSIGHT study, defendants' exhibit E.7, p. 31).

Hosting units, developed and created by players competing with TUNSTALL, are offered on the European market. Therefore, it does not appear that the patented protocols limit the downstream development of the market for reception units at European level.

It is not argued by the defendants that other DTMF providers, such as CHUBB or ASCOM active in Belgium, would deliver a deficient service to their end consumers.

40. In this case, both the general impression of TUNSTALL's dominance is lacking (since it shares the market with other major players, such as LEGRAND, in a homogeneous territory), and the existence of barriers to entry.

According to the data available to the cessation judge, the players active in this market have the same conditions for entry and expansion.

41. In conclusion, the evidence of TUNSTALL's dominance in the protocol market in the light of the market shares of docking units compatible with TUNSTALL's patented technology is not established.

On the one hand, it has not been shown that the capture by TUNSTALL of its market share would *ipso facto lead* to dominance on the said market.

On the other hand, there are no technological and technical barriers to entry that prevent the various players from entering the market for host units.

/?. Effects of TUNSTALL on the platform market

42. The market share of TUNSTALL and its licensees in the protocol market should be analysed on the basis of the proportion of platforms that are configured to operate primarily with TUNSTALL's patented technology versus platforms operating with alternative technologies.

As with the analysis carried out for the market for telecare units, this analysis is based on the market share of TUNSTALL and its licensees on the platform market (mainly using the patented technology) and on secondary criteria (such as the existence of technological barriers preventing players from developing on the platform market).

43. As stated above, the relevant geographic market for the protocols is European in scope.

For the same reasons, such a scope should also be retained for the platform market.

Neither linguistic criteria nor national peculiarities could lead to the conclusion that the platform market is national in scope.

One example of this is the fact that CSD LIEGE, which wanted to acquire a new "call centre software", called on foreign players. It should be noted in this respect that :

- In its specifications, it states: "*description of the software solution This must be maintained in Europe"* (defendants' exhibit D.2, p. 13), demonstrating the European nature of the platform market;
- The language of the tenderer is not in itself decisive since CSD LIEGE initially chose VICTRIX SOCSAN (Spanish) for the implementation of its new platform. This is obviously due to the fact that platforms can be designed to be adapted to the language of the operator (as with the helpdesk units).

Similarly, the BERG INSIGHT study shows that *monitoring software platforms* exist at the European level, such as TUNSTALL, LEGRAND, DORO, TELEALARM or CHUBB (see figures 2.4 and 2.6 of Tetude, pp. 30 and 32).

44. With regard to market shares, TELE-SECOURS and VICTRIX SOCSAN claim that 5 of the 8 major operators - not mentioned - in Belgium would use the TUNSTALL platform, and that the 3 other operators - ENOVATION, MEXTAL and T2i - would be licensed by TUNSTALL.

TUNSTALL would thus have a direct and indirect hold on the entire beige market of platforms. All connections would pass through a TUNSTALL platform or its licensees.

The defendants do not, however, provide any clarification as to the market share, at the European level, of platforms compatible with TUNSTALL's patented protocols.

45. TUNSTALL argues that the figures put forward by the defendants are speculations and points out that two of TUNSTALL's licensees - MEXTAL and T2i - have no presence in Belgium (being respectively active in the Netherlands and France).

46. The lack of information on the market share of platforms - of European scope - compatible with the patented protocols of TUNSTALL and its licensees prevents any conclusive analysis.

As with the analysis of compatible reception units, the cessation judge ignores ;

- the proportion of TUNSTALL platforms that operate primarily with patented technology;
- the penetration rate of TUNSTALL licensees on the platform market ;
- the proportion of TUNSTALL's licensing platforms that operate primarily with STMF technology.

It is therefore not possible to analyse TUNSTALL's possible dominance of the protocol market in the light of the market shares of the platforms compatible with TUNSTALL's patented technology.

47. However, market shares are not the only element of analysis for assessing possible dominance in a relevant market.

Other criteria may be taken into account. For example, barriers to market entry resulting from technological advances or a network effect *(see* above).

48. TELE-SECOURS and VICTRIX SOCSAN argue for this.

As for the market for reception units, they consider in substance that (that) :

- With the exception of its licensees, no input has been able to enter the platform market, demonstrating that the patented technology has the effect of locking out this market;
- The widespread use of the protocols creates a network effect, particularly thanks to the reliability guaranteed by the STMF protocols;
- TUNSTALL is indifferent to the behaviour of its competitors since there are barriers to entry to the market, resulting from the fact that its customers - described as captive - are unable to change platforms in complete safety due to the obligation to use STMF protocols, the only reliable protocol in an analogue network.

49. TUNSTALL contests this position and explains that the popularity of its products does not allow the existence of a network effect to be inferred (since, for example, TELE-SECOURS does not derive any more value from its platform when a competing telecare operator adopts the same platform).

Elie also notes that there is no barrier to entry as SKY RESPONSE has been able to acquire a significant presence on the platform market since 2012 in the Nordic and UK markets.

50. As the cessation judge pointed out, the patented technology has unparalleled advantages.

However, Elie does not seem to have established itself as a reference in the telecare sector and does not *seem to be* preventing new entrants from setting up and developing on the platform market.

For example, diagram 3 filed by the plaintiffs (p. 62 of their statement of claim) shows that platform providers (with customers throughout Europe) use DTMF technology to the exclusion of STMF technology (such as CHUBB or JONTEK, which are active in countries where the analogue network still dominates).

Effective competition in the protocol market is therefore possible without licensing the patented technology.

In this respect, the example of the development of the SKY RESPONSE company - whose *core business* is to develop platforms - is quite eloquent. SKY RESPONSE has succeeded in developing a market in the United Kingdom and Ireland where the telecare sector is still dominated by the analogue network. It is also clear from the applicants' Exhibit 36 that the company supplies almost 700 customers in Europe, working with almost 15 intermediary partners in nine European countries.

This shows *a fortiori* that there is no barrier to entry into the platform market, which would be induced by the existence of patented protocols.

51. The fact that a significant number of operators - a figure which remains unknown - use platforms compatible with the patented technology does not allow the existence of a network effect to be concluded either.

Indeed, such an effect is encountered when "*the utility of a good for an agent depends on the number of other users. Thus, the use of this network gives rise to increasing satisfaction with the number of users, hence the increased importance of acting as quickly as possible on this type of market*" (L. Leblond, *Pratiques anticoncurrentielles et brevets*, l^{ere} ed., Brussels, Bruylant, 2014, pp. 208-209).

As TUNSTALL points out, the fact that the patented technology is more widely used than other royalty-free protocols does not give additional satisfaction to those players who already use the patented technology. They are effectively indifferent to whether a competitor uses a platform running the patented protocols or other protocols.

It is also not in the commercial attitude of TUNSTALL to have tried to act quickly so that the patented technology would become a standard in such a way that it would become indispensable for the use of platforms.

52. In the end, the evidence of TUNSTALL's dominance in the protocol market in light of the market shares of platforms compatible with TUNSTALL's patented technology is not established.

Moreover, there is no technological or technical barrier to entry for players active in the platform market.

C. Conclusion

53. In conclusion, it has not been demonstrated that TUNSTALL has a dominant position on the protocol market and/or that its behaviour creates any risk of foreclosure of a competitor

on this market, or incidentally, on the downstream markets of the platforms or the remote handling units due to the use of TUNSTALL's patented technology.

Since the condition of dominance of the position is not met, there is no need to examine the condition of abuse.

4.2. Second way: Abuse of economic dependence

54. TELE-SECOURS and VICTRIX SOCSAN claim, in the alternative, that TUNSTALL is abusing the position of economic dependence in which they find themselves with regard to it, within the meaning of Article IV.2/1. CDE.

In essence, they allege that this behaviour is the result of TUNSTALL's refusal to grant them a licence to use the technology protected by European patent EP 2 160 038 and the protocols derived from it, which TUNSTALL disputes.

55. The regime attached to the abuse of economic dependence came into force on 22 August 2020, following the entry into force of the Act of 4 April 2019 amending the Code of Economic Law with regard to abuse of economic dependence, unfair terms and unfair market practices between companies (following the adoption of the Royal Decree of 31 July 2020 amending Books I^{er} and IV of the Code of Economic Law with regard to abuse of economic dependence).

56. Article IV.2/1. CDE provides that "e.s7 *prohibits the abuse by one or more undertakings of a position of economic dependence enjoyed by one or more undertakings in relation to it or them, where this may affect competition in the relevant market or a substantial part thereof".*

The offence of abuse of economic dependence is distinct from that of abuse of a dominant position, which involves the analysis of a market situation in absolute terms. On the other hand, abuse of economic dependence concerns "*a relative dominant position resulting from an unequal balance of power between determined economic actors*" (D. Philippe and G. Sorreaux, "L'abus de dependance economique"). Sorreaux, "L'abus de dependance economique, les clauses abusives et les pratiques du marché deloyales : premières regards sur la loi du 4 avril 2019", *D.A.O.R.*, 2019, n° 131, p. 22).

This difference between the two regimes is intended by the legislator. The latter realised that the legislative arsenal was incomplete insofar as the offence of abuse of a dominant position is established if it is "*exercised, on the market concerned, towards* all *customers or suppliers and towards* all *competitors*". However, situations of relative power on the market can occur and lead to economic dependence on the part of undertakings. Indeed, "*the dependence of* certain *customers or suppliers on a* certain *undertaking does not make it possible to consider that the latter is in a dominant position; nor does an undertaking have a dominant position vis-à-vis small and medium-sized competitors when it is*

(Prop. of Law amending the Code of Economic Law with regard to the abuse of a significant dominant position, *Pari.* Ch. repr. sess. 2015-16, no. 1451-001, p. 4).

Therefore, for an infringement of the prohibition of abuse of economic dependence to be established, an unequal balance of power between particular economic actors - irrespective of their dominance in the market in general - must be demonstrated.

In this case, it is necessary to analyse the possible power and dependency relationships between TELE-SECOURS and TUNSTALL on the one hand and between VICTRIX SOCSAN and TUNSTALL on the other.

57. The application of Article IV.2/1. CDE requires that the following conditions are met:

1. The position of economic dependence of one company on another;
2. The abuse of this situation ;
3. The effect on competition on the beige market concerns or a substantial part of it.

A. Economic dependency position

58. Article 1.6, *12bis*, CDE defines the position of economic dependence as "*the position of dependence of an undertaking on one or more other undertakings, characterised by the absence of a reasonably equivalent alternative available within a reasonable time, on reasonable terms and at reasonable cost, which would enable the undertaking or each of them to impose obligations or conditions which could not be imposed under normal market circumstances".*

Economic dependence must be considered in the individual relationship between two companies. *"If it is impossible to change trading partners on the same terms or if the cost of doing so is unreasonably high, there is economic dependence. As long as there are sufficient and reasonable possibilities to change trading partners under the same conditions, there is no question of economic dependence*" (Prop. of Law amending the Code of Economic Law with regard to the abuse of a significant dominant position, *op. cit.*, p. 7).

The CBA also points out that this definition of economic dependence is based on two intrinsically linked criteria that must be assessed *in concreto* (observations, p. 36):

- the lack of alternatives ;
- the fact that a company may impose abnormal performance or conditions.

This examination is not the same as that required to determine the existence of dominance on a market: "*an undertaking may be in a situation of economic dependence while a satisfactory level of competition remains on the market*" (N. Neyrinck, *op. cit.*, p. 441). This is also the

reason why the burden of proof on the undertaking complaining of dependence is less onerous than the burden of proof in the case of abuse of a dominant position (Prop. de loi modifiant le Code de droit economique en ce qui concerne 1'abus de position dominante significative, *op. cit.,* p. 7).

A.i. Between TELE-SECOURS and TUNSTALL

59. In the relationship between TELE-SECOURS and TUNSTALL, TELE-SECOURS claims in substance that it has no alternative to the patented protocols of TUNSTALL that would allow it to offer an identical service to its subscribers within a reasonable period of time, under reasonable conditions and at reasonable cost.

TUNSTALL is of the opinion that TELE-SECOURS is not dependent on the fact that it is free to terminate its contract and to change its provider.

60. The question is, in this case, to determine the degree of dependence of TELE-SECOURS on the patented technology of TUNSTALL (a.) and to determine whether an alternative supplier is able to deliver a platform to TELE-SECOURS at reasonable costs, on time and under reasonable conditions

(J}.), a. Degree of dependence

61. The patented technology is necessary for the proper functioning of TELE-SECOURS and for the quality of the services offered to its subscribers.

The patented technology ensures the secure transmission of information between the reception units of the mobile subscribers and the platforms that process this signal in an analogue network. TELE-SECOURS must take this technical fact into account.

TELE-SECOURS states that all of its televigilance activities currently require the use of the patented technology (p. 38 of the defendants' summary conclusions).

The cessation judge notes that (defendants' exhibit D.9):

- 13,165 units (68% of the stock) are based on the TUNSTALL PNC 6 platform and are configured in DTMF to switch to STMF;
- 4,766 units (24% of the stock) are NEAT units using the STMF protocol and the PNC 6 platform;
- TUNSTALL has issued technical instructions to set up the reception units with the programming code to communicate in STMF as the standard of operation (switchover from DTMF to STMF).

These figures are not contested by TUNSTALL. Also, although TUNSTALL asserts that the technical directive to switch from DTMF to STMF for certain units is isolated and is based

exclusively on a technical event, it does not provide any evidence to refute the fact that some TELE-SECOURS devices are currently operating with a default STMF setting.

62. As a result, an extremely large volume of the TELE-ESCOURS business is currently dependent on patented technology.

Without this technology, a significant part of TELE-SECOURS' business would lose quality and credibility with end customers, which is not disputed by TUNSTALL either.

63. This degree of dependence is also manifested in a form of 'forced' continuation of the commercial relationship on the part of TELE-SECOURS towards TUNSTALL.

TELE-SECOURS ordered from TUNSTALL, on 12 March 2014, a new platform, "PNC 7", to replace the previous one ("PNC 6") (Exhibit C.1 of the defendants).

Although the delivery of this tool was scheduled to take place within 12 weeks, TUNSTALL failed to meet its obligations for several years, so that TELE-SECOURS terminated the agreement on 12 March 2018 (Defendants' Exhibit C.2).

TUNSTALL also clearly perceived TELE-SECOURS' loss of confidence in it since, in response to the denunciation of the agreement, TUNSTALL - which proposed an alternative solution, with the installation of the new "PNC 8" platform - indicated that it "*understands that, after so much time spent waiting, fine words or brochures are not convincing*" (defendants' exhibit C.3).

It follows that the continuation of the relationship between the parties was seriously compromised as a result of TUNSTALL's failure to deliver the "PNC 7" platform.

These difficulties forced TELE-SECOURS to contact competitors of TUNSTALL. It appears that, from 17 July 2018, VICTRIX SOCSAN submitted an offer to TELE- SECOURS (i.e. at a *time* that was entirely consistent with the failure of TUNTALL and the breach of trust experienced by TELE-SECOURS; Exhibit C.5 of the defendants).

The attitude of TELE-SECOURS is unambiguous. TELE-SECOURS wanted to find a new supplier (necessarily a competitor of TUNSTALL) following the latter's failure and the resulting loss of confidence (which, moreover, TUNSTALL does not dispute). In this respect, it is not contested by TUNSTALL either that the change of platform envisaged by TELE- SECOURS in 2014 was justified in view of the "bugs" that had occurred with the PNC 6 platform.

64. TELE-SECOURS also claims that it is being imposed abnormal services and conditions, particularly in view of the unreasonable price paid to TUNSTALL for its services. In this respect, Elie points out that both ESI FRANCE and VICTRIX SOCSAN offer much cheaper rates for the same level of service.

TUNSTALL does not deny this fact and considers that it has treated TELE-SECOURS like any other telecare operator.

65. Under normal market conditions, TELE-SECOURS should have been able to definitively break away from TUNSTALL and contract with another platform provider. However, TELE-SECOURS remains captive to TUNSTALL since only the latter has the patented technology needed to ensure the connection between the vast majority of TELE-SECOURS' subscriber reception units *and* the future platform to be implemented.

fl. Existence of alternatives

66. There is no doubt that TELE-SECOURS is dependent on the technology of TUNSTALL.

This dependence must, however, be corroborated by the fact that TELE-SECOURS is unable to find an alternative supplier who is able to provide it with a platform that can offer equivalent services at reasonable costs, times and conditions.

67. TELE-SECOURS states that it has no alternative to the use of the patented technology since neither TUNSTALL nor its licensees are able to offer a competing platform that meets TELE-SECOURS' specific needs (in particular, thanks to a task management tool that allows proactive monitoring of subscribers).

TUNSTALL contests TELE-SECOURS' analysis and stresses, on the contrary, that a platform supplier - namely, ESI FRANCE - has already made an offer.

68. In this respect, after reading the defendants' exhibit D.6 of the defendants, it appears that ESI FRANCE, having been informed of VICTRIX SOCSAN's difficulties in implementing its platform for CSD LIEGE's public market, contacted TELE-SECOURS in order to offer its services (ESI FRANCE's *sales manager* thus approached TELE-SECOURS, (ESI FRANCE's sales manager approached TELE-SECOURS on 31 January 2022, and "*wondered whether Tele-Secours was not in the same situation as CSD Liege and proposed, if necessary, that ESI offer its services instead of Victrix").*

This means that ESI FRANCE is able to deliver a solution with a telecare platform to TELE-SECOURS.

However, without being contradicted by TUNSTALL, TELE-SECOURS states that ESI FRANCE is one of the licensees of TUNSTALL ("*at least one other competitor of Victrix, and licensee of TUNSTALL, that is to say the company ESI*", p. 14, of the defendants' summary conclusions).

The alternative company pointed out by TUNSTALL is in fact one of its licensees, which therefore uses the patented technology. The only credible offer made (apart from VICTRIX SOCSAN) by a platform provider is based on the use of the patented technology.

In the same way, the contract launched by CSD LIEGE - which is in a situation comparable to that of TELE-SECOURS, which is mainly equipped with TUNSTALL equipment - could not be honoured by VICTRIX SOCSAN since that company was prohibited from using the technology patented by TUNSTALL (p. 14 of the defendants' pleadings).

It is clear that platform providers capable of satisfying TELE-SECOURS or CSD LIEGE (being in a comparable situation) must have the patented technology in order to provide the same level of service to their subscribers. It has been shown above that TELE-SECOURS is particularly dependent on the patented technology.

69. Moreover, as the ABC points out (p. 37 of the observations), the concrete existence of alternative providers is closely linked to the technical possibility for this alternative provider to reconfigure the reception units placed at the premises of TELE-SECOURS' subscribers.

In this respect, the parties are in complete contradiction as to the feasibility and cost of this reconfiguration.

However, the cessation judge noted that, without being contradicted, TELE-SECOURS asserted that *"no beige operator was able to migrate to software other than that of Tunstall without the new provider having a licence to use the disputed Protocols"* (p. 33 of the defendants' pleadings).

Furthermore, it appears from TUNSTALL's explanations that, according to TUNSTALL, the reconfiguration of the reception units in order to connect them to another platform than TUNSTALL's, implies, in a first step, switching (or re-switching) all the units to DTMF protocol. Elie argues that this migration to DTMF could be done en bloc and is not at all costly, whereas TELE-SECOURS argues, on the contrary, that this switchover should be done individually to ensure that each subscriber remains connected. It explains that, as it has a large number of subscribers in a delicate health situation, the risk of not being connected could have vital consequences, which is not disputed. It argues that it could not run this risk and must therefore aim for a switchover process offering a 100% guarantee. For its part, while praising the ease of the bulk switchover it recommends, TUNSTALL is careful not to claim that a "bulk" switchover would provide a guarantee that each and every TELE-SECOURS subscriber is still connected.

TELE-SECOURS rightly concludes that *"no responsible monitoring operator can automatically switch a subscriber to a protocol without being absolutely certain that this switch will not cause a loss of connection.* (p 20 of its conclusions). It adds that, obviously, if it could do without the disputed protocols to switch its entire set of reception units to another protocol, it would already have done so and the present proceedings would have no reason to exist.

It is therefore understandable that TELE-SECOURS' position is to retain!- the patented technology to ensure that all signals sent by its subscribers will be requested by the new platform to be implemented.

Furthermore, to date, it is not clear from TUNSTALL's, TELE-SECOURS' or VICTRIX SOCSAN's explanations that DTMF technology would be capable of ensuring a continuous and secure connection between TELE-SECOURS' platform and its subscribers (even though the patented protocols are used in a particularly large proportion of TELE-SECOURS' business).

As acknowledged by all three parties, STMF technology is considered to be more reliable than DTMF protocols in an analogue network. There is, therefore, no alternative to this patented technology, on which TELE-SECOURS depends (as TUNSTALL is aware) with regard to its subscriber base.

70. In addition, as noted above, economic dependence is not established "*if there are sufficient and reasonable opportunities to change trading partners on the same terms".*

In fact, the only way for TELE-SECOURS to turn away from TUNSTALL is to use one of its licensees (such as ESI FRANCE). However, neither TUNSTALL nor its licensees are able to deliver a platform that meets TELE-SECOURS' expectations (which TUNSTALL does not dispute; *see* above, concerning the task management tool).

In other words, TELE-SECOURS is necessarily dependent on TUNSTALL or its licensees. At present, there are only two options available to it:

- or it maintains its relationship with TUNSTALL, but in this case TELE-SECOURS would not have a platform with all the necessary functions to provide the services proposed to its subscribers;
- either it breaks off its relationship with TUNSTALL (or its licensees), but in this case TELE-SECOURS would no longer have the patented technology, and therefore no longer have an operational platform, which would be particularly detrimental to it.

71. In this respect, the doctrine teaches that the criteria of "*the absence of alternatives and the 'rate of threat' [may] be decisive*" in assessing economic dependence (Ch. Binet, "Interdiction des abus de dependance economique, des clauses abusives et des pratiques de marche deloyales: vers une meilleure protection contre les abus dans les relations B2B?)

The threat rate (or threshold) is the circumstance that the loss of a customer (or supplier) constitutes a threat to the very existence of the supplier (or customer).

These criteria are met in this case: TELE-SECOURS risks losing a significant number of subscribers if it abandons the patented technology, and the only possible alternatives for the provision of a platform depend on TUNSTALL or its licensees (who, it should be recalled, do not offer a platform capable of meeting TELE-SECOURS' needs).

There are therefore no sufficient or reasonable alternatives for TELE-SECOURS to change its platform provider under the same technical conditions as those offered by competitors who do not have the patented technology.

72.11 It follows from the above that TELE-SECOURS is economically dependent on TUNSTALL.

A.ii. Between VICTR1XSOCSAN and TUNSTALL

73. In the relationship between VICTRIX SOCSAN and TUNSTALL, VICTRIX SOCSAN argues that it cannot enter the platform market without a licence for the patented technology, which would be sufficient to demonstrate its economic dependence.

In reply, TUNSTALL relies on the opinion of the CBA, which considers that, in principle, the situation envisaged by Article IV.2/1. CDE presupposes the existence of a contractual relationship between the undertakings. This is not the case here.

TUNSTALL also points out that economic dependence means that VICTRIX SOCSAN must demonstrate the possibility of having an alternative solution for continuing its activities without the licence. It considers that VICTRIX could satisfy its customers by using a technology different from the patented technology.

74. The existence of a contractual relationship between undertakings seems to be a precondition for the application of Article IV.2/1 of the CRC. The CBA considers that "*the situation envisaged by Article IV.2/1 of the CRC is generally that of an existing or past contractual relationship in which Tun of the contracting parties has become dependent*" (observations, p. 37).

The - still rare - case law seems to point in this direction. The Antwerp Court of Appeal has thus considered that *"there can only be a question of abuse of economic dependence when it is a question of a long-term contractual relationship between the companies" (Antwerp, 20 October 2021, NjW, 2022, p. 466).* (Antwerp, 20 October 2021, *NjW,* 2022, p. 466).

However, this decision has been critically commented upon. E. Van Heddeghem points out that *"In its second paragraph, Article IV.2/1 CDE lists a number of indications of abuse which are clearly situated in the pre-contractual phase"* (E. Van Heddeghem, "Misbruik van economische afhankelijkheid", note under Antwerp, 20 October 2021, *NjW,* 2022, p. 466).

The cessation judge noted that the condition of the existence of a contractual link is not provided for by the law and does not seem to derive from the preparatory work. However, it is necessary to establish a sufficient link between the undertakings in order to establish the existence of a dependency which, by its very nature, requires a relationship of strength between them.

75. In this case, the link between VICTRIX SOCSAN and TUNSTALL is that TUNSTALL would prevent VICTRIX SOCSAN from entering the platform market by refusing to license its patent.

In the analysis of TUNSTALL's possible dominant position, it was noted above that other players have been able to establish themselves on the platform market without having the patented technology.

However, the analysis of a possible abuse of an economic dependence position requires the judge to verify the particular situation of an undertaking vis-à-vis one or more other undertakings.

The examination of economic dependence therefore requires that VICTRIX SOCSAN can demonstrate *in concreto* that it has no alternative and that TUNSTALL is imposing abnormal conditions on it.

VICTRIX SOCSAN demonstrates by means of its piece D8 that the software market in Belgium is exclusively made up of TUNSTALL and its licensees. If VICTRIX wants to enter the platform market in Belgium, it has no alternative but to obtain a licence from TUNSTALL. The fact that neither the contract with the CSD in Liege nor the contract with TELE-SECOURS can be executed for the time being provides proof of this lack of alternative.

With regard to the imposition of abnormal conditions, VICTRIX SOCSAN is right to criticise the attitude of TUNSTALL, which has granted licences for its patent to all of VICTRIX SOCSAN's competitors on the beige market, but refuses to do the same with regard to the latter.

In vain, TUNSTALL argues that it could justify this refusal of licence because VICTRIX SOCSAN would have used its patented invention in violation of its rights. The fact that VICTRIX SOCSAN asserts that the platform it offers supports the patented technology does not prove that it uses this technology. Moreover, the seizure-description that TUNSTALL had carried out in April 2021 showed without any ambiguity that VICTRIX SOCSAN had not used the patented protocols. Thus, TUNSTALL maintains that VICTRIX SOCSAN would have been guilty of infringement of its patent, but this assertion is not established.

TUNSTALL does not provide any other justification for this refusal of a licence. It therefore imposes abnormal conditions of refusal on VICTRIX SOCSAN, while the latter offers to pay the market price to obtain this licence.

VICTRIX SOCSAN also points out that the televigilance activities of two of its customers, TELE-SECOURS and CSD Liege, currently require the use of TUNSTALL's patented protocols. As it does not have this licence, it cannot develop its business in Belgium with these two customers. It is therefore economically dependent on TUNSTALL.

The attitude of TUNSTALL forces VICTRIX SOCSAN to stay out of the platform market in Belgium. This causes it commercial damage and damage to its reputation. It is completely dependent on the goodwill of TUNSTALL to be able to execute two important contracts on the Belgian market.

76. The economic dependence of VICTRIX SOCSAN on TUNSTALL within the meaning of Article 1.6, 12°hA CDE is demonstrated.

B. Abuse of this dependence

77. It must also be established that the company creating the dependency is abusing the situation.

B.i. With regard to TELE-SECOURS

78. TELE-SECOURS argues that TUNSTALL is abusing the economic dependence it has created, making it captive to its patented technology and, incidentally, to platform fees from TUNSTALL itself or from its licensees.

It complains that TUNSTALL did not fully inform it of the consequences of using its products. In particular, it complains that TUNSTALL was asked to block the units in "STMF only" mode, which *ipso facto* obliged it to use the TUNSTALL platform against its will.

It also complains of exclusivity clauses in TUNSTALL's contracts for the sale of reception units, so that it was unable to approach other competitors for more than 10 years.

Eufin does not understand TUNSTALL's refusal to grant a licence to VICTRIX SOCSAN, even though the latter is offering to pay the market price.

79. TUNSTALL contests this analysis and relies, in substance, on the observations of PABC, which considered that "*It does not appear that TUNSTALL is guilty of any abusive behaviour towards TELE-SECOURS. TELE-SECOURS suffers the consequences of TUNSTALL's attitude towards VICTRIX*" (p. 39).

Elie also maintains that it has never concealed the patented nature of the technology and relies in particular on a marketing brochure to show that this information is communicated to its customers (plaintiffs' exhibit 5a).

Elie adds that the exclusivity clause was agreed between the parties, and that the contracts were valid for 2 years and tacitly renewed, without criticism from TELE-SECOURS.

80. The legislator has indicated that the existence of an abuse of economic dependence can be "*assessed by comparing the situation resulting from the excessive conduct or the situation that may prevail in the future (as a result of the conduct of the undertaking which holds its partner under its economic dependence) with an adequate counterfactual scenario,* (Proposition de loi modifiant le Code de droit économique en ce qui concerne 1'abus de position dominante significative, Amendement n° 6 de Mmes. Smaers et al. Ch. repr., Ord. sess. 2018-2019, No. 1451/003, p. 12).

In practical terms, a scenario in which economic dependence is maintained should be compared with one in which the operator creating the dependence does not adopt such behaviour.

81. The abuse complained of by TELE-SECOURS stems first of all from the behaviour adopted by TUNSTALL towards it throughout their contractual relationship. Whatever TUNSTALL may say, it is clear from the documents filed that TELE-SECOURS' attention was never drawn to the fact that the technology supplied by TUNSTALL was covered by a patent. TUNSTALL disputes this fact, but only submits a simple marketing brochure from 2012, which it is unclear whether TELE-SECOURS was ever given. On the contrary, it may be noted that in the supply contracts for the reception units concluded between the parties, no mention is made of the patented nature of the technology used by TUNSTALL in the products sold.

Secondly, TELE-SECOURS is also right to point out that TUNSTALL has repeatedly argued that DTMF protocols are less reliable and that STMF technology should be preferred.

TELE-SECOURS' explanations illustrate that over the years, without realising it, it has become captive to the behaviour of TUNSTALL.

Finally, VICTRIX SOCSAN's refusal to license the patented technology to implement its platform prevented TELE-SECOURS from migrating to VICTRIX SOCSAN's platform, making TELE-SECOURS captive to TUNSTALL.

It is in the light of this scenario that the abuse alleged by TELE-SECOURS should be assessed.

82. On the one hand, abuse is not defined in the law. The interpretation of this abuse is left to the discretion of the judge (Pres. Trib. Entr. Nl. Brussels, 16 March 2021, *Competitio,* p. 187).

On the other hand, the parliamentary works indicate that "*any behaviour that an undertaking can carry out by virtue of the fact that it holds its partner under its economic dependence constitutes an abuse of a position of economic dependence*" (Proposal for a law amending the Economic Law Code with regard to abuse of a significant dominant position, Amendment no. 6 by Mmes. Smaers et al. in *Pari Doc.* repr. sess. 2018- 2019, no. 1451/003, p. 12).

83. In this case, the analysis of the abuse of economic dependence implies to question the prohibition imposed by TUNSTALL on VICTRIX SOCSAN to have the patented technology to implement its platform with TELE-SECOURS.

In view of the above, the Termination Judge does not agree with TABC that there can be no abuse of economic dependence in such a configuration.

From the point of view of the applicable principles, the behaviour of an upstream undertaking with regard to an intermediary may constitute an abuse of a dependent undertaking. Such a situation exists in the present case: it cannot be ruled out that TELE-SECOURS may suffer an abuse of economic dependence as a result of TUNSTALL's conduct against VICTRIX SOCSAN (which is then forced to refuse its services to TELE-SECOURS).

84. The condition of abuse implies that "*only the abusive exploitation of this situation is indeed likely to affect not only the undertakings, but also the functioning and structure of competition*" (Ch. Binet, "Interdiction des abus de dependance economique, des clauses abusives et des pratiques de marche deloyales : vers une meilleure protection centre les abus dans les relations B2B ?", *R.D.C.-TB.H*, 2019, p. 853).

An undertaking may not "*engage in conduct which has the effect of hindering, by means other than those governing normal competition on the basis of the performance of economic operators, the maintenance of the degree of competition existing on the market or the development of such competition" (ibid.).*

Paragraph 2 of Article IV.2/1. CDE refers to examples of abuse. It provides that :

"May be considered an abusive practice:
1° the refusal of a sale, purchase or other transaction conditions;
2° the direct or indirect imposition of purchase or sale prices or other unfair trading conditions;
3° the limitation of production, markets or technical development to the prejudice of consumers;
4° applying unequal conditions to equivalent services to economic partners, thereby placing them at a competitive disadvantage;
5° making the conclusion of contracts subject to the acceptance by the

economic partners of

additional services which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

However, in addition to these examples, it is recognised that unfair terms and unfair trading practices referred to in Book VI, CDE may constitute other examples of practices which may constitute unfair exploitation within the meaning of Article IV.2/1, CDE.

To put it another way, "*a practice which is considered unfair within the meaning of Article VI.104 of the ECC may also become an abuse within the meaning of Article IV.2/1 of the ECC if it is the consequence of a situation of economic dependence and is likely to restrict or distort free competition. In this respect, one thinks in particular of aggressive unfair practices which are likely to affect the freedom of choice or conduct of an undertaking and to cause it to take a decision on a transaction which it would not otherwise have taken" (ibid.,* p. 854).

In this sense, the President of the Dutch-speaking Enterprise Court of Brussels ruled that the refusal of a provider to supply banking services to an enterprise, without any apparent reason, even though the enterprise has no alternative, violates Article VI. 104. CDE and, therefore, fulfils the condition of Tabus referred to in Article IV.2/1. CDE (Pres. Trib. entr. Nl. Bruxelles, 16 March 2021, *Competitio,]).* 187).

85. In particular, TELE-SECOURS argues that its entire stock of reception units depends on the patented technology and that it is incomprehensible that TUNSTALL refuses to grant a licence to VICTRIX SOCSAN (which is prepared to pay the market price).

This observation is reinforced by the fact that TUNSTALL has granted licences to competitors of VICTRIX SOCSAN (such as ESI FRANCE or NEAT).

TUNSTALL claims to have behaved normally towards TELE-SECOURS and denies that it has taken them captive.

86. TELE-SECOURS and TUNSTALL have had a commercial relationship since 2006 (p. 6 of the defendants' summary conclusions). TELE-SECOURS has thus been supplied with telehandling units until 2019 (representing almost all of its stock) and has a platform - which has become obsolete in its opinion - developed by TUNSTALL.

This relationship was, moreover, exclusive, as required by the contract between the parties.

It cannot be denied that this contractual relationship is part of TUNSTALL's corporate strategy, which was to develop an *end-to-end* solution for TELE-SECOURS (which it did to the end, by proposing to TELE-SECOURS the implementation of the "PNC 8" platform, following the failure of the "PNC 7" platform).

Given the length of the relationship between the parties and the range of services provided by TUNSTALL (from the provision of the remote handling units to the provision of the platform, incidentally involving the use of its patented protocols), TELE-SECOURS' business model has developed on the basis of the hardware and technology provided to it by TUNSTALL. In particular, the use of the patented technology has been essential to the continuation of TELE-SECOURS' business model (since it has been shown that it is dependent on it and that there is no alternative, especially since its customer base is dominated by the analogue network).

In addition to TUNSTALL's possible concealment of the patented nature of the technology, the history and intensity of the relationship between the two companies had the insidious effect of placing TELE-SECOURS' commercial development at the mercy of TUNSTALL.

In this respect, the length of the relationship may be an indication of economic dependence. The case law of the Antwerp Court of Appeal already cited is to this effect.

In addition to the length and intensity of the relationship, TUNSTALL's patented technology has effects on downstream markets, in which it is favoured. TELE-SECOURS is not free to choose its platform provider. This service is dependent on TUNSTALL and this dependence will continue until a viable solution is found to ensure a secure and continuous connection between TELE-SECOURS and all its subscribers.

Finally, TUNSTALL is able to upset the financial balance of its partner and can charge high prices to TELE-SECOURS.

This seems to be the case since, in TELE-SECOURS' opinion, TUNSTALL charges 50% more for the supply of the platform than VICTRIX SOCSAN or 15% more than ESI FRANCE (pp. 37-38 of the defendants' summary conclusions). This statement is not contradicted by TUNSTALL.

This behaviour shows that TUNSTALL is abusing the economic dependence of TELE- SECOURS. The latter is obliged to pay a high price for the provision of a platform that it considers obsolete, because no alternative platform provider that is viable in its eyes has the right to use the patented technology on which it is captive.

87. It should be recalled that "*Article VI. 104, CDE is the application of the general standard of care of Article 1382 of the Civil Code to commercial life, with some nuances. Fault may concern both unethical behaviour and a violation of a legal norm. As regards the damage and the causal link, it is in principle sufficient that the act is of such a nature as to damage the professional interests of another undertaking, without it being necessary to prove that the disloyal behaviour has actually caused damage*" (Ghent, 4 November 2019, *Yearbook of Market Practices,* 2019, p. 571 - underlined by the court).

Ethics and fair play are of particular importance in assessing honest market practices. As the cessation judge recalled above, the violation of these principles, and more generally of the concept of fairness referred to in Article VI. 104. CDE, may constitute an abuse within the meaning of Article IV.2/1. CDE.

TELE-SECOURS argues that it could not reasonably have expected that the patent at issue would be used in its centre. TUNSTALL argues, but wrongly, that TELE- SECOURS should have expected a reaction when a third party supplier makes unlawful use of its patented technology (which is not the case in this instance).

TELE-SECOURS is obliged to use its platform by means of the patented technology to maintain the quality of its services to its subscribers. This situation arises from the nature of the relationship between the parties and, in particular, from the trust that TELE- SECOURS has placed in TUNSTALL, which has been its partner for many years.

TUNSTALL cannot ignore this fact and cannot, under the pretext of TELE-SECOURS' contractual freedom, disregard the fact that the latter has no other alternative to the patented technology in the context of the implementation of a new platform.

TELE-SECOURS rightly argues that it could not foresee the use that would be made of its patented technology, even going so far as to seek to change its platform supplier (and this in a context where TUNSTALL itself failed to deliver the "PNC 7" platform despite TELE-SECOURS' patience in the implementation of this platform).

88. It follows from the above that TUNSTALL is abusing the economically dependent position of TELE-SECOURS.

B.ii. With regard to VICTRIX SOCSAN

89. As described above, the abusive nature of TUNSTALL's behaviour towards VICTRIX SOCSAN is also demonstrated.

It is on the basis of a false pretext of patent infringement that TUNSTALL refuses to grant VICTRIX SOCSAN the patent licence it has applied for. This refusal is therefore abusive. In addition, TUNSTALL's conduct towards VICTRIX SOCSAN is also abusive in that all of the latter's competitors on the beige market have requested a licence for its patent from TUNSTALL, which TUNSTALL does not dispute.

The unjustified and discriminatory refusal of the licence constitutes an abuse of the position of economic dependence in which VICTRIX SOCSAN finds itself vis-à-vis TUNSTALL.

C. Effect on competition

90. Finally, Article IV.2/1. CDE requires a demonstration that "*competition is likely to be affected in the market or in a substantial part of it".*

91. TELE-SECOURS claims, in this respect, that it is one of the most important players in the beige televigilance market and relies on a judgment of the Court of Cassation of 7 June 2018 which declared that this condition was fulfilled - albeit in the context of abuse of a dominant position - insofar as one or more pharmacists were subjected to restrictions on competition.

Elie also reports that TUNSTALL's behaviour affects other players in the televigilance market and that STMF technology is needed to support these players.

TUNSTALL did not conclude on this issue.

92. According to the literature, this third condition of economic dependence is the most ambiguous (N. Neyrinck, *op. cit.,* p. 449), so much so that part of the literature admits that it is not useful to examine it in the context of a judicial action (and, even more so, when the abuse stems from a violation of the general standard of loyalty referred to in Article VL104. CDE) (J. Leonard and E. Pieters, "L'abus de dependance economique en droit beige de la concurrence. Aperpu de la loi du 4 avril 2019 modifiant le Code de droit economique", *Competitio,* 2019, p. 16).

The authors consider that this condition must be interpreted broadly in order to give it a useful effect. The legislator's objective is indeed to protect small and medium-sized enterprises, not competition. Thus, the effect on competition may be real or potential (D. Philippe and G. Sorreaux, "L'abus de la concurrence", in Sorreaux, "L'abus de dependance economique, les clauses abusives et les pratiques du marché deloyales : premières regards sur la loi du 4 avril 2019", *D.A.O.R.,* 2019, n° 131, p. 27).

In practice, "it must be *established that the practice in question does not only affect the economically dependent entity or entities, but is likely to have wider effects of such a nature as to restrict or distort competition, whether on the market on which the undertaking(s) in question operate(s) or on the market on which the undertaking at the origin of the practice in question is active*" (Ch. Binet, *op. cit.,* p. 854).

93. As TELE-SECOURS reminds us, the condition of Affectation of Competition can be met when the dependent firm - albeit weak in relation to the "strong" firm - occupies a significant position on its relevant market (N. Neyrinck, *op. cit., p.* 451).

TELE-SECOURS claims that 20,000 subscribers are connected to its call centre (p. 5 of the defendants' summary conclusions). In 2018, there were approximately 80,000 users of telecare solutions in Belgium (p. 28 of the defendants' statement of claim by BERG INSIGHT, exhibit E.7). These figures, which are still recent, make it possible to establish that TELE-SECOURS occupies approximately 25% of the beige telecare market. Elie is therefore a key player in the sector.

Thus, if TELE-SECOURS were deprived of the possibility of offering its subscribers a linkable service (thanks to the patented technology installed by TUNSTALL), this player would potentially lose a substantial part of its clientele and could, if necessary, disappear (or, at the very least, experience serious financial difficulties forcing it to review its *business model).*

Such a situation sufficiently demonstrates that competition is substantially affected by the abuse of economic dominance.

94. Furthermore, Ch. Binet considers that abuse also occurs in the case of *self-preferencing* behaviour. Elie states that "*in cases where an undertaking competes on a downstream market with entities which are economically dependent on it on an upstream market, any practice adopted with regard to these entities which is likely to strengthen the position of the undertaking in question on the downstream market concerned cannot be regarded as normal competition*" (Ch. Binet, *op. cit.,* p. 855).

This is precisely the case here. The use of the patented technology obliges TELE-SECOURS to use the platform of TUNSTALL (or its licensee).

This means that TUNSTALL favours its position:

- on the one hand, on the protocol market vis-à-vis TELE-SECOURS, since no other player (apart from TUNSTALL's licensees) can provide the patented technology;
- on the other hand, on the platform market vis-à-vis TELE-SECOURS, since there is no supplier capable of developing a platform using the patented technology (a platform that has to meet specific conditions).

TUNSTALL is therefore in a position to increase its position in markets where TELE- SECOURS is specifically seeking more competition.

95. Definitely, TUNSTALL's behaviour is likely to affect competition in the beige market or a substantial part of it.

D. Consequence

96. TUNSTALL's conduct has been found to violate Article IV.2/1. CDE.

The infringement should be brought to an end and the defendants' counterclaim should be allowed.

The Court of Cassation has ruled that: *"In ordering the cessation of an act contrary to honest commercial practice, the judge may compel the offender to take the necessary measures to put an end to the offending act (art. 95 L.P.C.C.). An undertaking which commits an abuse of a dominant position by refusing to indicate the conditions to which it makes the supply of*

a service subject

may be ordered to formulate an offer specifying the method of calculation of the price demanded, on pain of a penalty payment". (Cass. (I Ch.) RG C.04.0186.F, 23 June 2005 (Telekom Austria A.G. / Kapitol), Annuaire Pratiques du commerce & Concurrence 2005, 630).

In the present case, TUNSTALL should be ordered to grant VICTRIX SOCSAN and TELE- SECOURS a non-exclusive licence to use its European patent, allowing them to use, on the Belgian territory and for as long as the royalties are paid, at the latest until the expiry of the patent, of the communication protocols "TT92 ST", "SMTP TT92" as well as any other communication protocol used by the televigilance units raised on the market by TUNSTALL and falling under the scope of protection of the patent.

97. In addition, the modalities for negotiating the licence to be granted must be decided:

- Regarding the time limit:

The 10-day period requested by the defendants to reach an agreement in principle seems very short and unrealistic.

The parties will have a period of 3 months to agree on the terms of the licence.

- Regarding the price :

The price of the licence shall be agreed between the parties and shall be in line with the market value. Without prejudice to the parties reaching an agreement, it shall be equal to the average price paid by other TUNSTALL licensees for the licence in the Belgian territory.

Since the defendants' request to obtain an agreement in principle on the licence before the financial conditions are definitively agreed upon is not granted, there is no reason to acknowledge VICTRIX SOCSAN's commitment to sequestrate a provision of €10,000.

- With regard to the additional claims made by the defendants :

The Defendants request that all documentation for using the patent be disclosed to them. TUNSTALL contests this request, claiming that all the information necessary to use the protocols is publicly available in its patent. This statement seems a bit short-sighted.

The defendants should be guaranteed the use of the patented protocols once the royalties have been paid. TUNSTALL will therefore be ordered to provide the defendants with the information necessary to use the protocols.

98. Finally, with regard to the action for injunction brought by TUNSTALL for infringement of its patent, since it is, by the present judgment, ordered to grant the defendants a

licence for its patent, it cannot pursue its action for patent infringement against the same parties.

The main application should therefore be declared unfounded.

99. The parties agree on the amount of the procedural indemnity. It should therefore be fixed at the sum of € 13,000.

ON THESE GROUNDS,

We, Francpoise Jacques de Dixmude, vice-president of the tribunal de 1'entreprise francophone de Bruxelles, sitting in replacement of the President, assisted by Mr. Jonathan Ferbus, clerk-head of department a.i.,

Ruling contradictorily,

Let's get the applications in,

Let's say the main claim is unfounded and let's stand up the plaintiffs.

Let the counterclaim be deemed to be well-founded to the extent hereinafter specified and accordingly :

Find that by refusing to grant the defendants a licence to use its European patent No. EP 2 160 038, Tunstall Group Holdings Limited is committing an abuse of economic dependence within the meaning of Article IV.2/1. of the Code of Economic Law;

As a result,

Order Tunstall Group Holdings Limited, or any other Tunstall Group company holding the rights to patent EP'03 8, to grant the defendants a non-exclusive licence to use European Patent No. EP 2 160 038 to allow them and their customers and subscribers to use, in the territory of Belgium, the communication protocols "TT92 ST", "STMF TT92", and any other communication protocols used by the televigilance units put on the market for the duration of the protection of the said patent, for the whole duration of the protection of the said patent, of the communication protocols "TT92 ST", "STMF TT92", as well as of any other communication protocol used by the televigilance units put on the market by Tunstall and falling within the scope of protection of the said patent, as from the 90th day following the notification of the present judgment, under penalty of a fine of 10.10,000 per day of delay in complying with this order;

Let us say for the record that the price of this licence shall be equal to the average price paid by other Tunstall licensees for the said licence in the Belgian territory and prorated according to the remaining period of validity of the patent at the date of the conclusion of the licence agreement;

We order Tunstall to provide the defendants with all the information necessary for the use of the Litigious Protocols in accordance with the licence to be granted by Tunstall, as from the day of the conclusion of the licence agreement, or as from the 90eme day following the service of the present judgment, under penalty of a fine of 10,000 € per day of delay in complying with the present order;

Let's say that the penalty payments will be capped at €1,000,000;

Order the three plaintiffs jointly and severally to pay the costs, liquidated damages for the defendants in the amount of €13,000.

In addition, we order them jointly and severally to pay the bailiff's fee of €165.

This judgement was rendered by the Chamber for injunctions of the French-speaking company court of Brussels, sitting in session, bd de Waterloo, 70, room E, and pronounced at
Extraordinary public hearing of 26 July 2022.

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Jonathan Ferbus

F. Jacques de Dixmude